ABSENCE MANAGEMENT

Compliance Update – third quarter 2019

Department of Labor issues two new opinion letters on FMLA and proposes revised FMLA forms

On August 8, 2019, the Department of Labor (DOL) issued an opinion letter on using FMLA for meetings to discuss a child's individualized education plan (IEP). The letter was written in response to an individual whose spouse's employer did not approve the spouse's request to take intermittent FMLA leave to attend IEP meetings. In the letter, the DOL explained:

- the FMLA defines a serious health condition as an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider;
- the FMLA provides an eligible employee up to 12 weeks of job-protected, unpaid FMLA leave per year to care for a spouse, son, daughter or parent of the employee if such a family member has a serious health condition; and
- that employee may use FMLA intermittently or on a reduced schedule when medically necessary because of a family member's serious health condition.

The DOL concluded that the spouse's attendance at IEP meetings qualifies for FMLA because the child has a serious health condition as certified by a health-care provider and that the spouse's attendance at the meetings qualified as "caring for a family member with a serious health condition." The DOL explained that caring for a family member with a serious health condition includes "mak[ing] arrangements for changes in care."

On September 10, 2019, the DOL issued another opinion letter, this one concerning an employee's ability to elect not to use FMLA for a leave also covered by a collective bargaining agreement (CBA) leave benefit. The employee asked the DOL whether his "employer must designate FMLA-qualifying leave as FMLA leave when an employee would prefer to delay the start of FMLA leave" to take a collectively bargained paid leave first. The letter also addressed how that would "impact the employee's seniority status under the applicable CBA and state civil service rules," because the CBA allowed seniority accrual while on leave.

For the first question, the DOL followed its opinion in its March 14, 2019, opinion letter (as detailed in our second quarter Compliance Update) which stated that the employer must designate a qualifying leave as FMLA and that it is not the employee's choice to delay the law's application. In practice, that meant that the employer would, where applicable, run the FMLA and CBA leave concurrently. With regard to the second issue, the DOL declared that the employee would still accrue seniority while the CBA leave "substitutes" for the FMLA (when the laws run concurrently).

In addition to issuing the two opinion letters this quarter, the DOL published proposed revisions to several FMLA forms. The DOL explained that the changes are designed "to increase compliance with the FMLA, improve customer service, and reduce the burden on the public by making the forms easier to understand and use." The DOL accepted comments on the changes to forms through October 4, 2019.

How is this applicable?

With regard to the August 8 opinion letter concerning IEP meetings, Sun Life Absence Management Services (AMS) has always administered leave using the standard of care (i.e., physical and psychological) referenced in the letter. The letter illustrates the broad scope of caring for a family member, noting that it applies beyond the activities of making arrangements for care, but also that "care" is a much different activity than providing "treatment."

The September 10 opinion letter is effectively a complement to the March 14 letter, and is not surprising given the DOL's position on mandatory designation. The upshot is that employers should revisit their leave policies, particularly if collectively bargained or other company-provided leaves exist, to ensure that their policies do not suggest the ability to delay FMLA leave.

Finally, with regard to the proposed revisions to the forms, Sun Life AMS submitted comments to the DOL. Additionally, as indicated in our prior Compliance Update, we will assess the changes in the DOL's final forms to determine whether our custom forms would benefit from similar revisions.

New York amends law to require employers to provide reasonable accommodations to domestic violence victims

On August 20, 2019, New York Governor Andrew Cuomo signed a law amending the New York State Human Rights Law. Effective November 18, 2019, the law will increase protections afforded to victims of domestic violence and prohibit employers from:

- refusing to hire or terminating someone because he or she is a victim of domestic violence;
- discriminating against a victim of domestic violence with respect to compensation or terms, conditions or privileges of employment;
- printing or circulating a statement, advertisement or publication expressing any limitation, specification or discrimination about someone's status as a victim of domestic violence; or
- using an employment application or making an inquiry about prospective employment expressing any limitation, specification or discrimination about someone's status as a victim of domestic violence.

In addition, employers will be required to provide reasonable accommodations to employees who are victims of domestic violence. The law specifies that employers must permit employees to take reasonable time off to seek medical attention, psychological counseling, services from a domestic violence shelter, program or crisis center, to participate in safety planning, or to obtain legal services or appear in court in relation to the incident of domestic violence. If an absence would constitute an undue hardship to an employer, the employer will not be required to provide leave.

Employees who plan to be absent will be required to provide advance notice when feasible. If not feasible, employees will be required to provide a certification to the employer within a reasonable time after the absence has occurred.

How is this applicable?
Sun Life AMS will administer this leave upon its effective date. New York is the eighteenth state to pass a law regarding unpaid leave for domestic violence victims. A key take-away from this law is that employers must grant a reasonable accommodation in addition to job-protected leave.

Important reminders

The following laws, detailed in previous updates, have notable upcoming milestones:

- Effective October 1, 2019, Sun Life AMS will administer a new leave in Maryland. Under the law, employers must provide a leave of absence of up to 60 business days to eligible employees serving as organ or bone-marrow donors. This leave applies only when an employee is not FMLA-eligible or has exhausted FMLA.
- Effective January 1, 2020, Sun Life AMS will administer a new leave in Oregon. Oregon employers with six or more employees must provide reasonable accommodations, including leaves of absence, to employees for pregnancy, childbirth or related medical conditions. Employers are required to provide notice to employees of their rights under this law.
- Illinois has amended its Living Donor Protection Act to prohibit employers from retaliating against employees who request or take leave of absence in relation to organ donation. The anti-retaliation mandate is effective January 1, 2020.

Sun Life

Content of this article is developed and owned by FMLASource, Inc., in support of Sun Life's Absence Management Services offering.

GVASFL-9020d

SLPC 29866 11/19 (exp. 11/21)